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No. 217

In the Supreme Court of the United States

OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In its brief (pp. 5–6), respondent for the first time in the course of this litigation poses a new argument,[1] based on the assumption that an em-

[1] In its brief at page 5, respondent also attributes error to our statement (main brief, p. 34, note 8): "Except for the present case, and one other case in which the employer was represented by the same counsel and which was withdrawn from enforcement for other reasons, *National Labor Relations Board* v. *Pacific Mills*, C. A. 4, No. 6257, 91 NLRB 60, prior to the decision below no objection had been raised to the revised method of computation." The case cited by respondent as an additional exception was decided June 17, 1952, after the April 29, 1952, decision in this case. The issue was not raised in the court of appeals until after the decision in this case, and was not raised at all before the Board.

ployee has been wrongfully discharged from a "seasonal" job, and finds interim employment in a non-seasonal industry. Respondent now suggests (p. 5) that its business is "seasonal," that the problems envisioned by it might therefore be encountered in this case, and that if applied to such a case the *Woolworth* formula (90 N. L. R. B. 289) would make the employee "more than whole." To illustrate its point, respondent offers the following hypothetical figures for the sums which the employee might have earned in the job from which he was discharged and in his interim employment (p. 6):

Quarter	*Estimated Earnings*	*Actual Earnings*
1	$1,800	$1,200
2	600	1,200
3	600	1,200
4	1,800	1,200
	$4,800	$4,800

Respondent concludes that under the *Woolworth* formula the employee would be awarded back pay of $1,200, whereas under the pre-*Woolworth* formula no back pay would be awarded.

Neither conclusion is necessarily correct. While we have shown in our main brief (pp. 26–30) that in many cases it is necessary, in order adequately to compensate the discriminatee for his loss of working time, to award him more back pay than he would have received under the pre-*Woolworth* formula, in respondent's hypothetical case both formulae will lead to the same result.

For respondent's example rests upon fallacious assumptions concerning the computation of gross back pay and interim earnings figures, a step which necessarily precedes application of either the pre-*Woolworth* or the *Woolworth* formula. When these figures are properly computed, application of the *Woolworth* formula leads to the same result as the formula previously in use, and fairly compensates the employee for the time he has lost from work.

The record[2] indicates that the hypothetical fluctuations in the earnings which the employee would have received in his original job would be accompanied by corresponding fluctuations in the time the employee works. Thus, in the second and third quarters of respondent's hypothetical case, the employee apparently would have been working only one third of full time had he not been discharged from his original job. In that event, he "would have sought and . . . obtained employment elsewhere" to occupy the remainder of his time (see *National Labor Relations Board v. Reed & Prince Mfg. Co,* 130 F. 2d 765, 772

[2] Each "driver-salesman" was paid a salary of $12 per week, plus seven cents for each case of 7-Up delivered. See Board's Appendix below, pp. 13–14; Tr. 37. These "driver-salesmen" apparently spend little, if any, time soliciting orders; they are given orders at respondent's office, and make the requisite deliveries. See Respondent's Appendix below, pp. 5–6; Tr. 73. As soon as they have completed their deliveries, they are free. See Board's Appendix below, p. 14; Tr. 39.

(C. A. 1)), thereby earning substantial amounts in addition to the $600 shown in respondent's table. Since the employer is not charged with these additional amounts in computing gross back pay, he cannot fairly derive benefit from the fact that the dischargee was employed elsewhere during the time when he could not have worked in his original job even if he had not been discharged. Accordingly, both before and after the *Woolworth* decision in 1950, in computing interim earnings which are to be deducted from gross back pay, the Board would consider only those interim earnings attributable to the periods when the dischargee would have been working in his original job; in respondent's hypothetical case, the Board would deduct only one third of the actual interim earnings for the second and third quarters from the gross back pay attributable to those quarters. This method of computation was well established before the *Woolworth* formula was devised, and has since been used in applying that formula. See, *e. g., National Labor Relations Board* v. *Reed & Prince Mfg. Co., supra; Earl I. Sifers, d/b/a Sifers Candy Co.*, 92 NLRB 1220, 1249. The table on the opposite page shows that application of either the pre-*Woolworth* formula or the *Woolworth* formula to respondent's hypothesis would result in an award of $1,600. Both formulae reach identical results, just as in any other case where the discriminatee's interim earnings for any quarter do not exceed the amounts he would have

earned in the job from which he was unlawfully discharged. See our main brief at p. 19.

TABLE A

An employee is unlawfully discharged from a seasonal job in which his earnings reflect with reasonable accuracy the hours of work.

Period of Unemployment	Gross Back Pay (seasonal)	Total Actual Earnings (non-seasonal)	Adjusted Interim Earnings	Net Back Pay	
				Pre-*Woolworth*	*Woolworth*
First Quarter	$1800	$1200	$1200	....	$600
Second Quarter	600	1200	400	....	200
Third Quarter	600	1200	400	....	200
Fourth Quarter	1800	1200	1200	....	600
Total	$4800	....	$3200	**$1600**	**$1600**

Respondent's objection goes not to the application of either the *Woolworth* formula or the pre-*Woolworth* formula, but rather to the method of computing the gross back pay and interim earnings to which the formula is to be applied. This computation of course does not take place until after the decree of enforcement is entered. "At the time an order of the Board is enforced the amount of back pay is often not computed. Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed. This may be done by negotiation; or it may have to be done in a proceeding before the Board. The computation of the amount due may not be a simple matter." *Nathanson* v. *National Labor Relations Board*, No. 33, this Term, decided Nov. 10, 1952, slip opinion, p. 4.

When in due course a back-pay hearing is held, it is unlikely that the Board will be presented with circumstances raising the problems which respondent poses. If such a situation should appear, presumably the hearing will show that the fluctuations in wages are correlative with fluctuations in working hours, and back pay will properly be computed as indicated above. Admittedly, however, the record is not conclusive on this point; at the hearing on back pay it may develop that respondent's "driver-salesmen" work full time throughout the year, earning less in the second and third quarters because their hours of work are less productive. If so, it may be expected[3] that the Board will take into account the irregular nature of the estimated cash earnings in the original job, and distribute those earnings among the four quarters on an accrual basis, to reflect more accurately the employee's loss of working time in each quarter, inasmuch as the *Woolworth* formula was designed to compensate the employee more accurately for his loss of working time in each quarter. In computing gross back pay, the Board would thus attribute to each

[3] Resort to speculation is necessitated by the hypothetical nature of respondent's argument. It is to be expected that employees wrongfully discharged from seasonal employment will generally find similar jobs in the same locality. Thus, their interim earnings will tend to be "seasonal" in about the same proportion as their gross back pay; the disproportionate hypothesis envisioned by respondent rarely, if ever, arises.

quarter one fourth of the estimated annual gross back pay.[4] In that event, the table below shows that the application of either the pre-*Woolworth* or the *Woolworth* formula would result in no award of back pay whatever.

TABLE B

An employee is unlawfully discharged from a seasonal job in which he works full time throughout the year, but his earnings fluctuate greatly.

Period of Unemployment	Estimated Earnings (seasonal)	Adjusted Gross Back Pay	Interim Earnings (non-seasonal)	Net Back Pay	
				Pre-*Woolworth*	*Woolworth*
First Quarter	$1800	$1200	$1200		0
Second Quarter	600	1200	1200		0
Third Quarter	600	1200	1200		0
Fourth Quarter	1800	1200	1200		0
Total	$4800	$4800	$4800	0	0

Only if the Board should answer these problems in some other way will respondent's argument present a controversy ripe for adjudication. In that event, the issue will not be whether the *Woolworth* formula may be applied, but whether the Board has properly computed the figures to which it should be applied.

[4] This allocation of a lump sum payment among the various quarters would be an obvious necessity in the case of a seaman, for example, who is paid at the end of a voyage for a trip covering many months.

Respectfully submitted.

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